IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE CENTRAL TRUST COMPANY, OF NEW YORK, (A CORPORATION) AND THE HELENA POWER AND LIGHT COMPANY (A CORPORATION.)

Appellants.

VS.

JOHN W. WARREN,

Appellee.

PETITION FOR RE-HEARING.

T. J. WALSH,
Counsel for Appellee.

Naegele & Co., Printers, Helena, Montana.

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PETITION FOR RE-HEARING.

The above named appellee, John W. Warren, hereby respectfully petitions the court to grant a re-hearing of this cause, for that:

1. The court evidently overlooked appellee's motion to dismiss the appeal.

2. The court evidently overlooked the argument made by appellee in his supplemental brief to the effect that even though it should be held that the mortgagor

corporation was organized under the provisions of Chapter XXV of the Compiled Statutes of the State of Montana, it had no authority to execute the mortgage sought to be foreclosed, and for that reason the judgment cannot be reversed.

This petition is printed pursuant to the rules of the court, together with an argument in support of the same.

R. R. PURCELL,
and
T. J. WALSH,
Solicitors for Appellee.

I hereby certify that in my judgment the foregoing petition for re-hearing is well founded, and that it is not interposed for delay.

T. J. WALSH,
Counsel for Appellee.

ARGUMENT.

I.

The opinion filed by the court reversing the judgment herein, makes no mention whatever of the motion filed by appellee to dismiss the appeal, and it has been assumed, consequently, that the motion has not been acted upon. The motion was filed, and before the argument commenced counsel for the appellee called the attention of the court to it, and the court announced that it might be presented with the main case. It was so presented, and subsequently, under leave of the court, appellee filed a supplemental brief in which the attention of the court

was called to another authority directly in point, and some additional argument was furnished. The views of the appellants were expressed in a further brief filed by them later, upon leave of the court.

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At the argument and in the brief the appellants objected to the consideration of the motion to dismiss the appeal, upon the ground that sufficient notice of the motion had not been given to them, as required by the rules of the court, five days' notice being required. It may be, although the court said nothing about the matter, that it took the view urged by the appellants that sufficient notice had not been given. The notice was served on the 3rd day of October, and advised the appellants that the motion would be brought on for hearing on the 8th. The appellants insist that both the 3rd day and the 8th day of October must be excluded in computing the time, and that consequently but four days' notice was given. The overwhelming weight of authority is against this contention. The rule of computation now almost universally declared is expressed in the Code of Civil Procedure of Montana in the following terms:

"Sec. 3459. The time in which any act provided by law is to be done is computed by excluding the first day and including the last day, unless the last day is a holiday, and then it is also excluded."

Applying this rule, it was held in

Young vs. Krueger, 92 Wis., 361,

that a summons served on the 11th of the month, return-

able on the 17th, is served six days before the return day; by the supreme court of Minnesota that six days' notice is given when the summons is served on the 11th, returnable on the 17th,

Smith vs. Force, 31 Minn., 119;

by the supreme court of New Jersey that five days' service of summons is satisfied by service on the 26th of April of a summons returnable on the first day of May,

Day vs. Hall, 12 N. J. L., 203;

by the supreme court of Indiana that a writ served on the 5th of January, returnable on the 15th, gives ten days' notice,

Reigelsberger vs. Stapp, 91 Ind., 311.

Notice of trial served on the 9th, for trial on the 19th, is sufficient under the requirement of ten days' notice for trial.

II Tidd's Practice, 755.

Notice posted on the 12th of July of an order returnable on the 22nd of the same month is sufficient as a ten days' notice under the statutory rule.

Bates vs. Howard, 105 Cal., 173.

Notice of trial served October 10th for a term of court beginning October 18th is a sufficient eight days' notice.

State ex rel. Curry vs. Weld, 39 Minn., 426.

These references might be multiplied indefinitely.

This rule of computation has been applied by the Supreme Court of the United States in

Siddons vs. Bogart, 18 How., 158,

and by the circuit court in

The Vigilancia, 68 Fed., 783.

Unless there is something exceptional in the language of the statute, or a rule which compels both the first and the last day to be excluded in the computation, it will not be done. Such was the case in the authorities cited by the appellants in support of their contention, at page 2 of their brief.

The notice was unquestionably served in time, but, as the objection touches the jurisdiction of the court over the subject matter, it would make no difference even though it had not been served at all, and the attention of the court had been called to the difficulty for the first time at the hearing.

————o————

The principal ground urged in support of the motion to dismiss the appeal was that the appeal is taken from a part of the judgment, and that no appeal lies from a part of a judgment. The original brief of appellee opened with a discussion of this proposition. (See same, pages 1-5.)

Section 6 of the act of congress approved March 3, 1891. provides "that the circuit court of appeals established by this act shall exercise appellate jurisdiction

to review by appeal, or by writ of error, final decision in the district court and the existing circuit courts."

Attention was called in the original brief to two decisions of the Supreme Court of Montana squarely in point on this proposition, and a decision from the State of Ohio equally direct; and in the supplemental brief filed, reference was made to the case of

Farmers' Bank vs. Key, 33 Or., 443,

also a direct authority. The Supreme Court of the Territory of Montana based its opinion on the language of the opinion in

Canter vs. American Ins. Co., 3 Peters, 316,

and its views on the subject were expressed in the following language:

> "When an appeal is taken from a judgment, it must be taken from the whole of it. The statute does not authorize the taking of a judgment into an appellate court for review by piecemeal. The appeal must bring the whole judgment before the appellate court. This court cannot reverse or affirm the fragment of a judgment. Jurisdiction for this purpose has not been conferred. * * * We hold that this court, under the statute, has no jurisdiction to hear an appeal from a part of a final judgment, unless the whole judgment is before it. The whole judgment must be appealed from to give this court jurisdiction over any particular portion."

The appellants in their reply brief say that they are at a loss to understand "how it can be suggested that, as to matters of procedure in federal courts, reference can or should be made to other than federal authorities,"

(page 10) and in that connection they say, with reference to the case of Farmers' Bank vs. Key, *supra,* (a case, as stated, directly in point) "the barest inspection of that case shows its inapplicability to the case at bar." This is simply a question of the construction of a statute. It is not a question of procedure in the federal court as distinguished from procedure in the state courts. The question is simply whether when the statute permits an appeal to be taken from "final judgment" it permits an appeal to be taken from "a part of a final judgment." Section 1869 of the Revised Statutes of the United States, conferred jurisdiction upon the Supreme Court of the Territory of Montana, at the time of the decision in

Barkley vs. Logan, 2 Mont., 296, and

Plaisted vs. Nowlan, 2 Mont., 359,

the cases above referred to, in which it was held that an appeal from a portion of a decree or final judgment is not authorized by the statute and cannot be maintained. The section referred to reads as follows:

"Writs of error, bills of exception and appeals shall be allowed in all cases from the final decisions of the district courts to the supreme courts of all the territories respectively."

The territorial statute provided that an appeal might be taken "from a final judgment."

In the case of Farmers' Bank vs. Key, the court said:

"The appeal must bring up the whole judgment, in order to give the court jurisdiction over any part of it.

On such an appeal the court may reverse, modify, or affirm the judgment appealed from in the respect mentioned in the notice, and may also review any intermediate order involving the merits, and necessarily affecting the judgment. Hill's Ann. Laws, Sections 544, 545. The proper practice in the case at bar would have been for the plaintiff to have appealed from the whole of the final judgment in the court below, assigning as error the intermediate order dissolving the attachment, and the refusal of the court to order a sale of the attached property in the judgment, and any other alleged error upon which it expected to rely on such an appeal. But it cannot give this court jurisdiction to review that portion adverse to it without appealing from the whole judgment. Crawford v. Roberts, 8 Or., 325; Sheppard v. Yocum, 11 Or., 234, 3 Pac., 824; Van Voories v. Taylor, 24 Or., 247, 33 Pac., 380; Bush v. Mitchell, 28 Or., 92, 41 Pac., 155; Barkley v. Logan, 2 Mont., 296. It follows that the appeal must be dismissed, and it is so ordered."

In the reply brief of the appellants it is said that the cases above referred to from the Supreme Court of Montana are no longer authority in that state, and the case of

Bank. vs. Fuqua, 11 Mont., 290,

is referred to in support of this statement.

The doctrine of these cases is affirmed in Bank vs. Fuqua, but attention is called in that case to the fact that the statute has been since changed so as to permit an appeal from a part of a judgment. It is expressly so stated in the opinion, and the statute in force after the admission of the state into the Union, is quoted as follows:

"An appeal may be taken to the supreme court in the following cases: first, from a final judgment, or *any*

part thereof, entered in an action or a special proceeding commenced in those courts, or brought into those courts from other courts."

It is apparent that the legislature considered that it would be necessary to incorporate in the statute the language, "or any part thereof," in order to permit an appeal from a part of a judgment. The case, instead of denying the contention of appellee, strongly reenforces it. In fact, the appellants have not called to the attention of the court a single case holding to the contrary, and it may with safety be asserted that there are none.

In Nashua vs. Boston, 51 Fed., 929, an appeal had been taken from a part of a judgment, and a motion was made to dismiss on other grounds. At the hearing the appellee filed another motion specifying that the appeal was taken from a part of the judgment only, but the court refused to consider this motion because filed without leave of court. The question was evidently not considered by the court, though they remarked in passing that the party had appealed only from the part he complained of.

With a purpose evidently to obscure the question, the reply brief enters into a lengthy consideration of what judgments are and what are not final judgments, so as to be subject to appeal, and as to the necessity of joining all of the parties in the appeal. A large number of cases are cited upon these questions, all of which are beside the question to be considered by the court. To illustrate: The case of

Central Trust Co. vs. Grant Locomotive Works, 135 U. S., 207,

is referred to, in which it is held that:

"A decree in a suit for foreclosing a railroad mortgage that the claim by an intervening creditor of an interest in certain locomotives in the possession of the receiver and in use on the road, was just and entitled to priority over the debt secured by the mortgage, is a final decree upon a matter distinct from the general subject of the litigation; and it cannot be vacated by the court of its own motion after the expiration of the term at which it was granted."

No attempt was made to take an appeal from any part of that decree. The question before the court was simply as to whether it was a final decree, and so not subject to modification by the court after the close of the term at which it was made. Reference was made to the case of Trustees vs. Greenough, in which an appeal was allowed from an order for the allowance of costs and expenses to a complainant suing on behalf of the trust fund, but that was the whole of the order. The entire order was appealed from. So in Hinckley vs. Gilman a receiver was allowed to appeal from a decree against him to pay a sum of money in a cause in which he was appointed. He appealed from the whole of this decree.

In Fosdick vs. Schall an appeal was taken from a decree upon an intervening petition in respect to certain cars used by a railroad company, but the appeal was taken from the whole of that decree. The case of

Eddy vs. Letcher, 57 Fed., 115,

is referred to. In that case, which was a foreclosure suit, an intervening petitioner was allowed damages for the negligent killing of her husband. An appeal was taken from the judgment and it was sustained. This was held to be a final judgment, and the supreme court said, "nor can the conclusion be otherwise, because separate appeals may be allowed on such interventions. Decrees upon controversies separable from the main suit may indeed be separately reviewed."

That is to say, that if there are several decrees in the same suit upon intervening petitions or otherwise, an appeal may be prosecuted from each separate decree, assuming that it is final. There are no separate decrees in this case. There is only one decree.

The case of

Central Trust Co. vs. Madden, 70 Fed., 451,

is of the same nature. In that case a judgment creditor applied to the court in a foreclosure action before the entry of the decree of foreclosure, asking that his judgment be decreed to be superior to the lien of the mortgage, and directing that it be paid. Such an order was made, and from that order an appeal was taken. The appeal was taken from the whole order that had been made.

It is said in the brief, at page 6, that in

Illinois vs. Kilbourne, 76 Fed., 887,

an appeal was taken from a part of the decree allowing intervenor's claim. It appears clearly from the opinion

that the appeal in that case was taken from the whole of the decree allowing intervenor's claim, this appeal having been entered before any decree of foreclosure.

We repeat that not one single case has been cited in which it was held that an appeal would lie from a part of a decree. The almost universal recognition of this rule of law finds expression in the language ordinarily used in speaking of the action of the appellate tribunal. Thus, in the opinion filed in this cause, the court says:

> "The decree of the circuit court is reversed in so far as it provides that a judgment in favor of the appellee is a lien upon the real property of the Helena Power and Light Company, and a lien on the mortgage or deed of trust of the Central Trust Company of New York."

The court does not say "that part of the decree" is reversed, but the "decree is reversed" as to that part. This court could hardly reverse the decree, because the decree is not before it on this appeal. Thus the Supreme Court of Montana said:

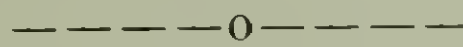
> "We hold that this court, under the statute, has no jurisdiction to hear an appeal from a part of a final judgment unless the *whole judgment is before it*. The whole judgment must be appealed from to give this court jurisdiction over any particular portion."

> "The decree is not here, so that we can notice it," and again, "we cannot modify it while the main portion of the judgment is in the district court and subject to its jurisdiction."

In the supplemental brief, we referred to the fact that the authorities hold that a party has no right to

complain of a portion of a decree which does not affect his interests, and that if a party appeals from a decree he cannot be heard in the appellate tribunal to urge that it is erroneous except in those parts which affect him. This does not give him the right to appeal from a part of a decree, as appeal must be taken from the whole decree, and then, in the language of the opinion in this case, the decree will be reversed as to that part by which his interests are affected.

The reply brief of the appellants calls attention to the prayer of the appellee's answer, and argues that by reason of some admissions made therein this motion to dismiss the appeal cannot be granted. No admissions made by the appellee could confer jurisdiction upon this court to review a part of a judgment unless the statute gave it that power.



Another objection urged to this appeal is that the complainant, Central Trust Company, and the defendant, Helena Power and Light Company, have no right to join in this appeal. The appellants seem to labor under the belief that we are urging that the appellant Helena Power and Light Company is not a proper party to the appeal. That it is a necessary party is not open to doubt or question, upon the authorities. If the Central Trust Company desired to take an appeal from this decree, it could do so by making the Helena Power and Light Company and Warren appellees. If the Helena Power and Light Company desired to take an appeal

it could do so by making the Central Trust Company and Warren appellees. But there is no right whatever in the Central Trust Company and the Helena Power and Light Company to join in an appeal. They have no joint rights.

We also urged, not as a ground for dismissing the appeal, but also as a reason why the court could not review the matters urged, that the Central Trust Company and the Helena Power and Light Company had made a joint assignment of errors, and that a joint assignment of errors could not be made unless a joint exception had been taken below, and that no exception whatever to the decree was taken by the Helena Power and Light Company, nor was any exception taken by the Helena Power and Light Company to the order of the court denying the motion of the Central Trust Company for a decree in accordance with the prayer of its complaint, notwithstanding the answer of Warren. A discussion of this subject will be found at pages 5 to 7, inclusive, of the original brief. The attempted answer to this is found at pages 9 and 10 of the appellants' reply brief. The principles contended for and the authorities are not disputed, but it is said that the claim "confounds the decree in the main suit of the foreclosure proceeding, to which all the parties consented, with the controversy between appellants and appellee as to the latter's right of priority."

W must confess that we do not understand what is meant by the expression "main suit." There is only one suit here. If the action had been begun by the

Central Trust Company against the Helena Power and Light Company, and subsequently Warren had intervened, it might be proper enough to speak of the original action as the "main suit." If, on such intervention, a decree had been rendered in his favor, adjudging the lien of his judgment to be prior to that of the mortgage, and directing the receiver to pay it, and such decree had been entered prior to the decree of foreclosure, an appeal would unquestionably lie from that order under the authorities cited in the appellants' brief; but there is but one action here, and the expression "main suit" has no significance whatever.

It is said also in the same connection that to the judgment awarding this priority both appellants excepted in the circuit court. The record does not sustain this contention. The Helena Power and Light Company was not represented. It was not there at all.

Then on page 10 it is said, "the basis of the complaint here is, not the denial of any motion in the circuit court, but the rendition of a decree in favor of appellee awarding him priority." If the court will turn to the assignment of errors, it will find that the first assignment of error is as follows:

> "The court erred in denying the motion of the complainant for a decree in its favor as prayed for in its bill of complaint, notwithstanding the answer of the defendant John W. Warren, because the said answer contains and presents no defense to such bill of complaint."

The motion referred to in this assignment was not served upon the Helena Power and Light Company, it

was not present at the hearing of the motion, it took no part in the same, it made no objection to the court's denial of the motion, and it is incorrect to state that it excepted to the ruling of the court below.

II.

The court reaches the conclusion that the Helena Power and Light Company was not organized under the provisions of Chapter XXXV, but of Chapter XXV, the language of which is sufficiently comprehensive to permit of the incorporation of a street railway company. With this conclusion, upon this application for a re-hearing, we have no controversy. That we accept as a settled proposition, but we insisted at the argument that if the company was to be deemed to have been incorporated under the provisions of Chapter XXV, the mortgage of the complainant is altogether void, because no authority is given by the provisions of that chapter to the corporation to execute a mortgage upon its property, and in view of the nature of the corporation, its business and its property, it has no power to execute a mortgage upon its entire plant except by express legislative authority.

We obtained leave of the court to file a brief presenting this consideration, and it was subsequently served and filed. Inasmuch, however, as the subject matter is not adverted to in the opinion of the court at all, and it is assumed that the controversy is disposed of when the conclusion is reached that the company was organized under the provisions of Chapter XXV, we assume that by some accident the supplemental brief did not come

into the hands of the court. In it we presented the proposition that "corporations *having public duties to perform,* such as railway companies, canal companies, turn-pike companies, gas-light companies and the like," have no power or authority to mortgage their franchises or any of their property necessary to discharge those public duties, except by express permission of the legislature.

4 Thompson's Commentaries, 5355-5356.

We called the attention of the court to the rule laid down in

Jones on Corporate Bonds and Mortgages, Secs. 2-3,

denying to a corporation of that character the right to alienate in any form property necessary to the discharge of its public functions, and to the authority of Wood's Railway Law, to the same effect, and to a long line of cases in the Supreme Court of the United States, commencing with

Thomas vs. Railroad Co., 101 U. S., 71,

in which these principles were applied. We referred the court to the case of

Richardson vs. Sibley, 87 Am. Dec., 700,

in which the Supreme Court of Massachusetts held that a street railway company has no power to mortgage its rights, franchise or property without legislative authority; and to the case of

Visalia vs. Sims, 104 Cal., 331,

in which the principle was applied to an alienation made by a company organized to operate gas and electric works, and which had obtained a franchise or license from the municipal authorities. We feel impelled to believe, inasmuch as no reference is made in the opinion to these questions at all, that by some accident the argument in which they were presented for the consideration of the court did not come under its notice.

We most respectfully insist that the position is well founded in law, and that no convincing reasons are urged in the reply brief of appellants why the mortgage should be sustained.

As in the case of the answer to the discussion of the proposition the appellee asserts for the dismissal of the appeal, viz., that an appeal will not lie from a part of a judgment, the appellants on this branch of the case go into a lengthy discussion of matters other than the proposition contended for. A long discussion is indulged in to establish the general proposition that a power to sell and convey includes a power to mortgage. The appellee certainly never undertook to dispute that proposition, and if any authority can be found in the statute authorizing the Helena Power and Light Company to sell and convey all of its property and franchises, it is conceded that the same provision would authorize it to execute a mortgage of its property. But there is none such. In the supplemental brief of appellee we called attention to a section of the statute which authorizes corporations created under the provisions of Chapter XXV "to hold, purchase and convey such real and per-

sonal estate as the purposes of the corporation may require" (brief, page 7), and we showed by decisions of the Supreme Court of the United States that this statute did not authorize or permit the corporation to execute a mortgage upon is entire plant.

In the case of

> Central Trans. Co. vs. Pullman's Palace Car Co., 139 U. S., 24-61,

the court said:

> "Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or lease its *entire* property and franchise to another corporation."

> In Branch vs. Jessup, 106 U. S., 468,

the same idea was expressed in the following language:

> "Generally, the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company; and it does not extend to the sale of the railroad itself or of the franchises connected therewith."

Notwithstanding these decisions, conceded to be in point as they must necessarily be, the appellants in their brief call attention to this statute as a justification for the execution of the mortgage.

The brief also calls attention to Section 447, which provides, among other things, that corporations created under the provisions of Chapter XXV shall have the power "of holding or conveying, by deed or otherwise, any real or personal estate whatever, which may be nec-

essary to enable the said company to carry on their operations named in the certificate.''

Under the decisions of the Supreme Court of the United States above referred to, and the case of

Coe vs. Columbia R. R. Co., 10 Oh. St., 372,

and Jones on Corporate Bonds and Mortgages, referred to at pages 8 and 9 of the supplemental brief, this does not authorize a mortgage by the Helena Power and Light Company of its entire property.

And then the attention of the court is called to Section 1555 of the Compiled Statutes, which provides that:

> ''All mortgages or deeds of trust of both real and personal property within this territory, heretofore or hereafter executed by any incorporated company, shall be governed by the law relating to mortgages or deeds of trust of real property, and be recorded, etc., etc.''

It is not contended that *no* corporation created under the provisions of Chapter XXV has any authority to execute a mortgage. We stated at page 4 of the supplemental brief ''that an ordinary commercial corporation has the implied right to execute mortgages upon its property.'' If any such corporation shall execute a mortgage or deed of trust, it becomes subject to the provisions of Section 1555. Certainly there is nothing in this section which modifies in any way the rule of law to which we appealed, viz., that corporations with public duties to perform have no power, without express legislative permission, to execute a mortgage upon the property necessary to the discharge of their public duties.

Before proceeding farther, it may be desirable to call the attention of the court to the averments of the answer of the appellee, which are taken as confessed.

It is therein set forth that "at all times since on or about the first day of January, 1895, and down to the time of the filing of the complaint herein, the Helena Power and Light Company was engaged in operating lines of street railway in and over the streets of Helena, Lewis and Clarke County, Montana, and in furnishing electric and gas light to the city of Helena and the inhabitants thereof, the electric wiring being furnished by wires strung through the streets of the said city of Helena, and the gas through pipes and mains laid through the streets of the said city of Helena, and that the said defendant, Helena Power and Light Company, has so and for such purposes occupied the said streets and conducted the said business under *franchises* to it granted bythe said city of Helena under authority of acts of the legislature of the State of Montana, and under franchises granted by the general laws of the State of Montana."

Transcript, pages 47-48.

It is further averred "that all the property mentioned in the mortgage attached to the bill of complaint herein, was, at the time of the commencement of this action and at all times had been, held by it, so long as it held the same, under such franchise so as aforesaid to it granted."

Transcript, page 48.

The appellants appear to contend that nearly if not quite all the questions involved in this record have been determined in its favor by the case of

> Knight vs. Helena Power & Light Co., 22 Mont., 391.

It might be well to consider for a moment just exactly what was decided in that case. The Helena Power and Light Company had constructed a line of street railway, known as the "Lenox Additional Line." After operating this line for some time it ceased to run cars on it presumably because it did not pay, and was about to tear up the track, and an action of mandamus was brought against it to compel it to operate the line. The court refused to grant the writ. It appears in the reply brief to be contended that because the Supreme Court of Montana would not issue a writ of mandamus to compel the Helena Power and Light Company to operate its "Lenox Additional Line," that the principles to which we appeal have no application.

In the case of

> N. P. R. R. Co. vs. Terr. of Washington, 142 U. S., 442,

the Supreme Court of the United States reversed a judgment by the Territory of Washington issuing a writ of mandamus to compel the Northern Pacific Railroad Company to maintain a station at Yakima City. In the opinion by Mr. Justice Gray it appears that the Supreme Court of the United States held that mandamus could

not issue in that case for exactly the same reason that the Supreme Court held that it could not issue in the Lenox Additional Line case. In the latter casethe Supreme Court of Montana held that the ordinance of the city of Helena gave the Helena Power and Light Company the privilege to construct the line, but that the street railway company had not obligated itself to operate or maintain it. In the opinion in Northern Pacific vs. Territory of Washington, the Supreme Court of the United States says:

> "If the charter of a railroad corporation simply authorizes the corporation, without requiring it to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or to maintain its road to that point when it would not be remunerative."

It would be a rather startling proposition to assert, however, that in the case last above referred to the Supreme Court of the United States had overruled the case of

Thomas vs. R. R. Co., 101 U. S., 71,

or announced any principles whatever in conflict with the law of that case.

The reply brief of appellants upon this feature of the case contains a lengthy extract from the opinion in the case of

Hunt vs. Memphis. 31 S. W., 1007,

in which it was held that the principle that corporations of this character have no power to execute mortgages upon their property without express legislative authority was held inapplicable to the case of a gas-light company.

What was really decided in that case, was not that the general principle asserted was not sound, but simply that it did not extend so far as to embrace gas light companies. Of the soundness of the principle as it applies to street railway companies, no court has yet ever ventured to express a doubt.

In the very latest work on corporations, an admirably prepared treatise, occurs the following:

"This principle applies to all corporations which are given the power of eminent domain *or other special privileges,* and which in return therefor, are under a special duty to serve the public—as ordinary railroad companies, *street railroad companies,* sleeping-car companies, canal companies, water companies, *gas and electric light companies,* cemetery companies and the like."

1 Clark and Marshall, 441-442.

In support of the text as to street railway companies the author cites:

Richardson vs. Sibley, 87 Am. Dec., 700;

Middlesex vs. Boston, 115 Mass., 347;

Abbott vs. Johnston, 80 N. Y., 27;

Doane vs. Chicago, 51 Ill. App., 353;

and as to gas companies,

Visalia vs. Sims, 104 Cal., 326;

Brunswick Gas Co. vs. United Gas Co., 85 Me., 532;

Chicago Gas Co. vs. People's Gas Co., 121 Ill., 530;

Gibbs vs. Con. Gas Co., 130 U. S. 396;

Bath Gas Co. vs. Claffy, 74 Hun, 638,

and then adds,

"But see Commonwealth vs. Lowell, 12 Allen, 75;
Evans vs. Boston Heating Co., 157 Mass., 37; and
City of Detroit vs. Mutual Gas Co., 43 Mich., 594."

They then, however, lay down the qualification as follows:

"But it does not apply to purely private corporations which are not vested with power of eminent domain, or *other special privileges,* and which owe no special duties to the public, although their business may be in a sense public. Thus it does not apply to a gas light company which is not given the power of eminent domain or other special or exclusive privileges," (and here Hunt vs. Memphis is cited.)

An examination of the case of Evans vs. Boston Heating Co., 157 Mass., 37, will show that it did not appear in that case that the company was granted any privileges whatever by the public. The appellants venture to assert that this case overrules Richardson vs. Sibley, but this contention cannot be sustained. The last mentioned case was expressly affirmed in Middlesex vs. Boston, above cited. The authors above quoted continue:

"The principle also applies to a mortgage of its property by such a corporation, for, as was said by Judge Hoar in a Massachusetts case, 'the power to mortgage can only be co-extensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure.'

Commonwealth vs. Smith, 10 Allen, 448-455."

The general principle is expressed by the authors in the following language:

"It is clear that a corporation cannot, without express authority from the legislature, transfer or mortgage its franchise to be a corporation, for this would result in the creation of a corporation without the consent of the legislature. Nor, according to the better opinion and the weight of authority, both in England and in this country, can a *quasi* public corporation transfer the franchise to be a corporation, conferred upon it by its charter, as the franchise or privilege of constructing and maintaining a railroad, a canal, or water or gas works, or a turn-pike or plank road, or a bank, etc., unless such transfer is expressly authorized by the legislature or ratified by it. This principle not only applies to an absolute conveyance, but it also applies to a lease, or *mortgage*."

1 Clark and Marshall, 444-445.

In Booth on Street Railways, 423, the same doctrine is declared in the following language:

"The reasons which support the policy of the law forbidding the sale by a railroad corporation of its franchises, and property acquired by eminent domain, without legislative authority, apply in the case of mortgages given by the corporation," and in support of the text, the author cites Richardson vs. Sibley, and Commonwelath vs. Smith.

The case of

Brunswick Gas Light Co. vs. United Gas Co.,
85 Me., 532,

is apparently directly opposed to the authority of Hunt vs. Memphis, but the conflict is probably more apparent

than real. In the Maine case it either appeared or was assumed that the company enjoyed some privileges granted by the municipality.

The right to operate a street railway over the streets of a city is a special privilege. It was decided in

Fanning vs. Osborn, 102 N. Y., 442,

that the right to construct and operate a street railway is a franchise which must have its source in the sovereign power, and that the construction and maintenance of a street railway by any individual or association of individuals without legislative authority constitutes a public nuisance, and subjects those maintaining it not only to indictment, but to a private action in favor of any person sustaining special injury therefrom.

The Supreme Court of the United States had something to say as to the nature of gas companies, and the powers exercised by them in

Gibbs vs. Con. Gas Co., 130 U. S., 396.

In that case, Mr. Chief Justice Fuller, announcing the opinion of the court, said:

"These gas companies entered the streets of Baltimore under their charters in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to *fulfil the public purposes, to subserve which they were incorporated.*"

And the following is found in the syllabus in

New Orleans Gas Light Co. vs. Louisiana Light Co., 115 U. S., 650,

viz.:

"3. The manufacture and distribution of gas by means of pipes, mains, and conduits, placed, under legislative authority, in the public ways of a municipality, is not an ordinary business, in which everyone may engage, as of common right, upon terms of equality; but is a franchise relating to matters of which the public may assume control, and, when not forbidden by the organic law of the state, may be granted by the legislature, as a means of accomplishing public objects, to whomsoever, and upon what terms, it pleases."

In the body of the opinion the court quotes with approval the following language from

> Crescent City Gas Light Co. vs. N. O. Gas Light Co., 27 La. Ann., 147:

"The right to operate gas works, and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets, and lay down gas pipes, erect lamp-posts, and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the state, and, in the exercise of the police power, the state could carry on the business itself or select one or several agents to do so."

Thus gas and electric light companies and street railway companies must likewise be held to have assumed to discharge public duties. The Circuit Court of Illinois said, in

> Chicago Gas Co. vs. People's Gas Co., 121 Ills., 530:

"The manufacture and distribution of illuminating gas by means of pipes or conduits placed by legislative authority in the streets of a town or city, is a business of a public character. It is the exercise of a franchise belonging to the state. The services rendered and to be rendered for such grant are of a public nature. Such right is conferred by public grant as well for the benefit of the public as of the corporation taking the same."

By the language of the authorities cited, it will be observed that it is not necessary that the corporation should have the right of eminent domain in order that the principle to which we appeal should be operative as against it, provided that it obtains special privileges from the public, and is enabled to carry on its business only because of its having such special privileges. These special privileges to occupy the public streets, the Supreme Court of the United States speaks of in the Gibbs case as the equivalent of the right of eminent domain, but under the statutes of the State of Montana the right of eminent domain may be exercised in favor of corporations undertaking to supply "heat or gas for the use of the inhabitants of any county, city or town, or "railroads" and "telephone or electric light lines." Section 2211, Code of Civil Procedure.

It is not material either whether the right to occupy the public streets is denominated a "franchise" or a mere privilege, but that it is aptly designated as a "franchise" is not open to doubt.

In addition to the authorities heretofore referred to, we call the attention of the court to the following:

"The word 'franchises' is frequently used to designate those special privileges and powers conferred upon a corporation for the furtherance of some public work, such as the rights of eminent domain and those rights or privileges which are essential to the operating of the corporation and without which its roads and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines and the like."

I Elliott on Railroads, 67.

Even in the case of

> State ex rel. Knight vs. Helena Power and Light Co., 22 Mont., 391,

the following may be found:

"The *franchise* in question was granted by the city council, and the claim is that it is by virtue of that concession, and its acceptance by the company, that the duty arose. But the ordinance, which is quoted above, merely grants 'the privilege' of constructing and maintaining street railways over the lines therein designated."

The brief of the appellants undertakes to establish that the rule to which we appeal applies only to commercial railroads, but we have shown by abundant authority that it is not so restricted. A similar statement is found in the opinion in the case of Hunt vs. Memphis Gas Co., and it is there stated that this contention is supported by Beach on Private Corporations, Jones on Mortgages, and Morawetz on Corporations.

> Appellants' Reply Brief, page 21.

A reference to the authorities mentioned will show that in using the expression "railroad corporations" they made no distinction whatever between street railways and what are called "commercial railroads," in proof of which the case of Richardson vs. Sibley is cited in each case. The language of the court is not at all sustained by the authority of Jones on Mortgages. At the section referred to, the views of that author are expressed as follows:

"Corporations to which are given large powers and valuable privileges, from the exercise of which it is ex-

pected the public will derive advantage, are impliedly restrained in their power of alienation. Railroads are of this class. They cannot mortgage their franchise or property essential to the continued operation of the road without legislative authority.''

That this corporation had no power to execute the mortgage which is made the basis of this suit, we believe to be thoroughly established by the decisions of the Supreme Court of the United States, which are in accord on this question with the holdings of the courts generally, and, of course, if the complainant never had a valid mortgage it ought not to have its claims satisfied out of the property of the mortgagor company in preference to the appellee under his judgment.

But here also the appellants claim that some dangerous admissions have been made by the appellee. We never before heard it asserted that a proposition of law was admitted by anything in a pleading. We understand the elementary rule of pleading to be that the facts well pleaded may be admitted, either expressly or by failure to deny, but we understood it to be equally well established that conclusions of law are never admitted.

We have no right to complain of this judgment any further than our interests are affected by it. We have no reasons to urge why the property of the Helena Power and Light Company should not be sold so long as our judgment is satisfied out of the avails. It is useless to contend that because we say in the answer that we are willing the property should be sold, we thereby admit that the complainant has a valid mortgage upon the

property. The validity of its mortgage depends upon the facts. The fact is that the complainant was organized under the provisions of Chapter XXV of the Compiled Statutes; that it was engaged in carrying on a public business; that with its property it occupied the streets of the city of Helena, under ordinances of that city, and that it could conduct its business only by so occupying the streets; that it was engaged with its property in the performance of public duties, and because, and only because it was so engaged could it obtain the right to occupy the streets. From these facts we insist that it is the law that the complainant had no valid mortgage and no admission made in the pleadings can affect this proposition.

We most respectfully submit that the court, in the discharge of its duties, ought to consider and dispose of these questions involved in this record and render its decision as they shall be found to affect the decree. They are both questions of very grave moment, the one to the profession, and the other to the business community. We most respectfully request that the appellee be given an opportunity, by oral argument, to present these questions more fully for the consideration of the court, should it deem it necessary. We have no fault to find with the opinion of the court upon the questions canvassed in it, but we respectfully submit that, notwithstanding the conclusions there urged, this decree ought not to be reversed.

Respectfully Submitted.

T. J. WALSH,

Counsel for Appellee.